6-7-2012

State v. Corwin Respondent's Brief Dckt. 38479

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	NO. 38479
	)	
LARRY DEAN CORWIN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JESSICA . LORELLO
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SARAH E. TOMPKINS
Deputy State Appellate
Public Defender's Office
3050 N. Lake Harbor – Ste. 100
Boise, ID 83703

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Larry Dean Corwin appeals from the judgment of conviction entered upon the jury verdict finding him guilty of felony driving under the influence and a persistent violator enhancement, claiming, for the first time on appeal, that the prosecutor committed misconduct during closing argument.

Statement Of Facts And Course Of Proceedings

While on patrol just after midnight, Deputy Darrell Meacham noticed an oncoming truck with the high beams on, which the driver did not turn off as he approached the deputy's patrol car. (Tr., p.187, L.20 – p.188, L.23.) As a result, Deputy Meacham turned around for the purpose of making a traffic stop. (Tr., p.188, Ls.22-23.) Before activating his overhead lights, Deputy Meacham saw the truck turn into a subdivision under construction where none of the houses were occupied. (Tr., p.190, L.23 – p.191, L.6.) Deputy Meacham initiated the traffic stop of the truck before it pulled back out of the subdivision. (Tr., p.248, Ls.8-14.)

Deputy Meacham made contact with the driver of the truck who identified himself as Corwin. (Tr., p.193, Ls.1-20.) While Deputy Meacham was talking to Corwin, he noticed Corwin's eyes were bloodshot and glassy, his speech was slightly slurred and his movements were "fumbling." (Tr., p.198, Ls.7-11.) Based on these observations, Deputy Meacham asked Corwin to perform field sobriety tests. (Tr., p.198, L.23 – p.199, L.2.) Corwin failed those tests and later

submitted to a breath test, which showed he had a blood alcohol content of .083/.085. (Tr., pp.201-233.)

The state charged Corwin with driving under the influence and filed an Information Part II alleging Corwin is a persistent violator. (#35305 R.[1], pp.26-27, 36-38; R., pp.42-43.) The case proceeded to trial after which the jury found Corwin guilty of felony driving under the influence and found Corwin is a persistent violator. (R., pp.140-142.) The court imposed an enhanced unified 30-year sentence with 10 years fixed. (R., pp.186-189.) Corwin filed a timely notice of appeal. (R., pp.191-194.)

[1] The charges in this case were originally filed in 2007 and Corwin was convicted in 2008. (R., pp.5-6.) Corwin appealed. (Idaho Supreme Court Docket No. 35305.) After Corwin filed his opening brief, the state and Corwin filed a stipulation to vacate his judgment of conviction and remand the case for a new trial. (Stipulation for Vacation of Judgment, Remand for a New Trial, and Dismissal of Appeal, Docket No. 35305.) The Idaho Supreme Court granted the relief requested in the stipulation. (Order to Vacate Judgment; Remand for New Trial and Dismiss Appeal with Prejudice, Docket No. 35305.) The Reporter's Transcript and Clerk's Record from Corwin's prior appeal has been augmented to the record on appeal in this case. (R., p.2.)

ISSUE

Corwin states the issue on appeal as:

> Did the prosecutor commit misconduct, rising to the level of a fundamental error, during closing arguments when the prosecutor mischaracterized Mr. Corwin's arguments, appealed to the passion and prejudice of the jury, and misstated the law regarding the jury's right to determine all facts relevant to the issues at trial?

(Appellant's Brief, p.8.)

The state rephrases the issue on appeal as:

Has Corwin failed to establish he is entitled to relief based upon the prosecutor's closing arguments to which he did not object?

ARGUMENT

Corwin Has Failed To Show Fundamental Error With Respect To His Unpreserved Claims Of Prosecutorial Misconduct

A. Introduction

Corwin claims the prosecutor's closing remarks regarding Corwin's performance on one of the field sobriety tests, which remarks were not objected to, constituted misconduct amounting to fundamental error. (Appellant's Brief, pp.14-17.) Review of the complained of remarks in context and under the applicable legal standards shows no error, much less fundamental error.

B. Standard Of Review

"Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (citations omitted). Where a claim is raised for the first time on appeal, the appellate court will consider whether the error alleged qualifies as fundamental error. Id., 150 Idaho at 228, 245 P.3d at 980.

C. Corwin Has Failed To Establish Reversible Error In Relation To The Prosecutor's Remarks In Rebuttal

Corwin contends the prosecutor engaged in misconduct during closing argument by stating the following during rebuttal:

> [Trial counsel] said -- I think I wrote this down right -- Mr. Corwin was walking straight from his perspective, but not from the officer's perspective. Even with all the evidence in this case, I'm glad we're looking at this from the officer's perspective. From Mr. Corwin's perspective, if that was a straight line, then we're all in trouble because he had to -- when he fell off line, which is exactly what we're talking about at that point, when he stepped off line by a

> foot, he did so to stop himself from falling over. So the line from his point of view was crooked and careening down onto the ground. That's -- that's not the type of line we want a driver to follow.

(Appellant's Brief, p.10 (quoting Trial Tr., p.370, Ls.4-17).)

Because Corwin did not object to the prosecutor's rebuttal argument, in order to show he is entitled to reversal of his conviction based on the prosecutor's comments, he must satisfy the three-part test articulated in Perry, which governs claims of unobjected to constitutional error. That three-part test requires Corwin to demonstrate that (1) "one or more of [his] unwaived constitutional rights were violated"; (2) "the error [is] clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision"; and (3) "the error affected the [his] substantial rights," *i.e.,* that it affected the outcome of the trial. Perry, 150 Idaho at 226, 245 P.3d at 978. Application of this standard to Corwin's claims of unpreserved error demonstrates he has failed to meet his burden of establishing he is entitled to reversal of his conviction.

According to Corwin, he has satisfied the first prong of the Perry test because, he argues, the prosecutor's remarks "violated [his] constitutional right to due process and to a jury determination on the facts in three ways." (Appellant's Brief, p.10.) "First," Corwin argues, "the prosecutor in this case misstated [his] actual arguments in his defense" by "impl[ying] that [he] was arguing to the jury that they had to defer to his personal assessment of his performance during the field sobriety tests in weighing the evidence of whether Mr. Corwin was intoxicated." (Appellant's Brief, p.10.) Corwin claims that he "never argued that

his own subjective assessment should control the jury's determination" but instead "argued that the human element could have played a role in the officer's assessment of Mr. Corwin's performance on this test – *i.e.*, that it could have been a matter of the officer's subjective perspective while observing Mr. Corwin that he was not walking along a straight line." (Appellant's Brief, pp.10-11.) This assertion is not supported by the record. Corwin's entire argument on this point was as follows:

> Other examples of the human element, the state's already alluded to some of them. During the walk and turn test, for instance, the whole issue is did Mr. Corwin step off the line, and, if so, how far, et cetera, but, of course, there wasn't any line. That's a really good example of the human element because **it's entirely possible that Mr. Corwin was walking straight from his perspective, but not walking straight from the officer's perspective** and there's just absolutely no way to determine who's right and who's wrong in that situation.

(Tr., p.356, L.23 – p.357, L.9 (emphasis added).)

In response, the prosecutor basically quoted the highlighted language and then said, "Even with all of the evidence in this case, I'm glad that we're looking at this from the officer's perspective." Exactly how this "implied" to the jury that Corwin "was arguing . . . that they had to defer to his personal assessment of his performance" is unclear. The comments, particularly when considered together and in context, were an express rejection of Corwin's claim that the jury was precluded from determining who was "right" and who was "wrong" about whether he was able to walk a straight line because of the "possible" different "perspectives." Urging the jury to reject Corwin's argument in this regard was hardly improper, particularly since the only evidence before the jury was Deputy

Meacham's perspective because Corwin did not testify. As such, there were no differing "perspectives" for the jury to consider.[2] Corwin's claim that the prosecutor "mischaracterized" his closing argument is belied by the record; therefore, his contingent claim that the alleged mischaracterization violated his constitutional rights necessarily fails.

Corwin next claims the prosecutor committed misconduct when, "after implying that Mr. Corwin had argued that the jury should view the walk-and-turn solely from his perspective," the prosecutor "asserted to the jury that, 'we're all in trouble,' if they believed Mr. Corwin's argument." (Appellant's Brief, p.11.) Corwin asserts this statement "injected an appeal to the jury's fears if they accepted the State's characterization of [his] defense." (Appellant's Brief, p.11.) This argument fails for at least two reasons. First, it is predicated on the erroneous assertion that the prosecutor mischaracterized Corwin's closing argument in the first instance. Second, the prosecutor never said "we're all in trouble" if the jury "believed" Corwin's defense. What the prosecutor said was "we're all in trouble" if, from Corwin's perspective, "that was a straight line" because Corwin "stepped off line by a foot" so that "the line from his point of view was crooked and careening down onto the ground," which is "not the type of line we want a driver to follow." (Tr., p.370, Ls.9-17.) Contrary to Corwin's claims on appeal, these comments did not "inject[ ] an impermissible appeal to the passions and prejudice of jurors" (Appellant's Brief, p.11), but were a fair

[2] Indeed, the only evidence of Corwin's "perspective" on his performance of the field sobriety tests was his statement to Deputy Meacham that he failed the tests. (Tr., p.209, Ls.18-20.)

discussion of the evidence and a fair response to Corwin's argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009) (citations omitted) (noting that "both parties are given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom" and that a prosecutor's comments "must be evaluated in light of defense conduct and in the context of the entire trial"); see also Darden v. Wainwright, 477 U.S. 168, 179 (1986) ("[t]he prosecutors' comments must be evaluated in light of the defense argument that preceded it").

Corwin finally contends that "the prosecutor in this case impliedly argued to the jury that they were required to defer to Officer Meacham's assessment of Mr. Corwin's performance on the field sobriety test, rather than to weigh the import of this evidence on their own." (Appellant's Brief, p.12.) More specifically. Corwin argues that the statement, "I'm glad we're looking at this from the officer's perspective" was a "remark" that "impl[ied] that the jury was required to measure and view Mr. Corwin's performance on the field sobriety tests from the perspective of Officer Meacham." (Appellant's Brief, p.13.) This was not improper because the jury's evaluation of the evidence of Corwin's performance on the field sobriety tests was necessarily limited to Deputy Meacham's testimony because there was no other evidence presented on how Corwin performed on those tests. To the extent Corwin is suggesting that the prosecutor's arguments required the jury to simply accept Deputy Meacham's testimony as true, such a claim is not supported by the record. Any such claim also ignores the court's instructions to the jurors informing them that "as the sole

judges of the facts, [they] must determine what evidence [to] believe and what weight [to] attach to it" (R., p.148), they were to follow the court's instructions in determining guilt (R., p.147), and that the arguments of counsel are not evidence (R., p.144), and it ignores the legal presumption that the jurors followed those instructions. State v. Carson, 151 Idaho 713, 718, 264 P.3d 54, 59 (2011) (citation omitted) ("We presume that the jury followed the jury instructions given by the trial court in reaching its verdict.").

Because Corwin has failed to establish the prosecutor's rebuttal remarks were error, much less error of a constitutional magnitude, he has failed to satisfy the first prong of Perry. Even if Corwin could overcome the first Perry hurdle, he has failed to meet his burden with respect to either the second or third prongs.

Corwin contends the alleged errors "are plain from the face of the appellate record and were not the result of any tactical decision on the part of trial counsel in failing to object" because, he argues, he "received no tactical benefit" from the prosecutor's statements. (Appellant's Brief, p.14.) This argument misunderstands the plain error prong. Whether Corwin feels he "received [a] tactical benefit" from the prosecutor's closing argument is wholly irrelevant to "whether the failure to object was a tactical decision." There could be a number of reasons a defense attorney would not object to a prosecutor's rebuttal remarks other than the remarks were not providing a "benefit" to the defendant.[3] For example, perhaps defense counsel did not think the prosecutor

[3] Indeed, it is probably a rare circumstance where a defendant receives a "benefit" from the state's closing argument and an objection on this basis would be frivolous.

was mischaracterizing his argument, and he was surely in a better position to judge that than appellate counsel. Defense counsel may also subscribe to the belief that "[f]rom a strategic perspective," objections during closing argument should be limited to only "the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991). "Whatever the actual explanation," it is not apparent on the record, and, in any event, "*Strickland* [*v. Washington*, 466 U.S. 668, 689 (1984)], requires [the Court] to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Molina, 934 F.2d at 1448. In short, prong two requires the Court to consider more than Corwin's belief that the decision was not strategic because he did not "benefit" from the prosecutor's comments and Corwin has failed to establish that the alleged errors were "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision."

Also relevant to prong two is the principle that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974); see also State v. Severson, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009) (quoting Donnelly). Similarly, this Court should "not lightly infer" constitutional error based on what Corwin believes the prosecutor "implied"

by his arguments. (See, e.g., Appellant's Brief, pp.10 ("[t]he prosecutor implied to the jury"); 12 ("the prosecutor in this case impliedly argued to the jury").) In other words, claims based on implication cannot constitute plain error where, as here, less damning interpretations are at least possible.

Regarding the final prong of Perry, Corwin argues the alleged error was not harmless because, according to him, "the strength of the State's overall evidence in this case was not overwhelming." (Appellant's Brief, p.14.) As an example, Corwin notes that "[a]lthough the State presented evidence of [his] breath test for alcohol that registered amounts above the legal limit, his results were only 0.083 and 0.085." and "a person's breath alcohol concentration varies over the passage of time." (Appellant's Brief, p.15.) This argument is without merit. In order to prove Corwin was driving under the influence based on his blood alcohol content, the state was only required to prove that Corwin's breath test results were .08 or above. I.C. § 18-8004(1)(a). The evidence that Corwin exceeded .08 was "overwhelming" in that the breath results admitted at trial exceeded .08 and were uncontradicted. Corwin's reliance on the notion that "a person's breath alcohol concentration varies over the passage of time" in an effort to undermine the evidence presented is unpersuasive because he cites no evidence from which the jury could conclude that any delay in the administration of those tests resulted in a higher blood alcohol content than he would have had at the time he was arrested. To the contrary, if anything, the evidence supports the conclusion that Corwin's blood alcohol content was higher at the time of his arrest than when he provided the breath samples to Deputy Meacham. (Tr.,

p.282, L.23 – p.283, L.9 (noting, among other things, that when "you stop drinking . . . you start eliminating").)

Corwin also claims the state's evidence was "not overwhelming" because he "exhibited no pattern of actual impairment in his driving other than his failure to dim his high beams when passing the officer." (Appellant's Brief, p.15.) This is not entirely accurate. As noted by Deputy Meacham, consideration of Corwin's driving pattern also included the fact that Corwin turned into an unoccupied subdivision after Deputy Meacham turned around and started following him. (Tr., p.192, Ls.10-17.)

Even if Corwin's blood alcohol content and his driving pattern cannot be considered "overwhelming," that is not the standard for showing reversible error. The standard is whether the alleged error affected the outcome of the trial. Perry, 150 Idaho at 226, 245 P.3d at 978. It did not. The remarks Corwin complains about are limited to Corwin's performance on one of three field sobriety tests. Even if the jury felt improperly compelled by the prosecutor's arguments to accept Deputy Meacham's conclusion that Corwin failed the walk and turn test, that was not the only evidence demonstrating Corwin was guilty of driving under the influence. In addition to the blood alcohol content and driving pattern, which are not the subject of any claim of error, the state also presented evidence that Corwin's performance on the horizontal gaze nystagmus and the one leg stand, which are also not the source of any claimed error and which indicated Corwin was driving under the influence. (Tr., pp.201-204, 207-209.) Add to this the evidence presented regarding Corwin's appearance and

demeanor (Tr., p.198, Ls.4-11) and this Court can easily conclude that any error associated with the prosecutor's comments on the walk and turn test did not affect the outcome of the trial. Corwin has failed to meet his burden of establishing otherwise.

Because Corwin has failed to satisfy the three-part test articulated in Perry, he is not entitled to reversal of his conviction.

CONCLUSION

The state respectfully requests that this Court affirm Corwin's judgment of conviction for felony driving under the influence with a persistent violator enhancement.

DATED this 7th day of June, 2012.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of June, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/mg